

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

KMART CORPORATION

PLAINTIFF

V.

CIVIL ACTION NO: 1:06CV73 LTS-JMR

REALTY TRUST GROUP, INC.

DEFENDANT

ORDER

The Court has before it the motion of Defendant Realty Trust Group, Inc. (RTG) to dismiss this action on the grounds that Plaintiff Kmart Corporation (Kmart) is obliged to assert the claims in this action as a compulsory counterclaim in a lawsuit filed two days earlier than this action in the United States District Court for the District of Nebraska.

This action involves the rights of the parties under a lease for certain property in Long Beach, Mississippi. The improvements to this property were destroyed in Hurricane Katrina, and the parties dispute the status of the obligation to pay rent and to restore the damaged property under their lease arrangement.

I have examined a copy of the complaint filed in the Nebraska court, and the first named defendant in that action is Sears Holding Corp. d/b/a KMART Corporation. Kmart has submitted its Corporate Disclosure Statement which reflects: "Kmart Corporation is a third-tier subsidiary of Sears Holding Corporation, a Delaware Corporation. Sears Holding Corporation owns 100% of the stock in Kmart Holdings Corporation; which owns 100% of the stock in Kmart Management Corporation; which owns 100% of the stock in Kmart Corporation."

Thus it appears that Kmart Corporation is not a named defendant in the Nebraska lawsuit. It follows that Kmart has neither the right nor the obligation to file a counterclaim in the Nebraska proceedings. At this juncture, I can see no reason the separate corporate identity of Kmart should not be respected.

Accordingly, the RTG motion to dismiss [4] is hereby **DENIED**.

SO ORDERED this 11th day of April, 2006.

s/ *L. T. Senter, Jr.*

L. T. Senter, Jr.

Senior Judge

